LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
NOV 13 1961
JOHN F.

IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. ...544

ARTHUR H. SHAFFER and M. JAMES SPITZER,
Trustees,
Petitioners,

versus

C. GORDON ANDERSON, as Trustee in
Reorganization,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

M. JAMES SPITZER,
Attorney for Petitioners,
595 Madison Avenue,
New York 22, N. Y.

REICH, SPITZER & FELDMAN,
KNIGHT, SMITH, UNDERWOOD & PETERS,
of Counsel.

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented for Review 2

Statutes Involved 3

Statement of the Case 3

The Facts 3

The Opinions Below 8

The District Court 8

The Court of Appeals 9

Reasons for Allowance of Writ

1. The decision below that § 229 of the Bankruptcy Act grants the power to set aside a confirmed but unconsummated plan of reorganization is in conflict with decisions of the Second, Sixth, and Seventh Circuits 12
2. The holding below that there can be no compromise settlement of a claim in a reorganization proceeding until after substantial consummation of a plan conflicts with decisions in the Third, Seventh, and Tenth Circuits ... 16
3. In conflict with the decisions of this Court, the opinion below permits revocation of decrees on which litigants have acted to their irretrievable detriment, on the premise that no intervening rights can vest before substantial consummation 16
4. The order revoking confirmation of the plan of reorganization was made without affording petitioners even a semblance of a judicial hearing 18
5. The decision below exempting respondent from laches, estoppel, and lack of diligence because he is a court officer, is in conflict with holdings of the Second, Third, Sixth, and Seventh Circuits 19

Conclusion 19

Table of Citations

PAGE

Cases:

Petition of Baxter (In re Orinoco Corp.), 269 F. 344, cert. den. 256 U. S. 694 ..... 17, 19

Caplan v. Anderson, 256 F. 2d 416 3

Caplan v. Anderson, 259 F. 2d 283 ..... 4, 10

Country Life Apartments v. Buckley, 145 F. 2d 935 ..... 12, 13, 14, 15

Curtis v. O'Leary, 131 F. 2d 240 16

In re Diversey Building Corporation, 141 F. 2d 65 ..... 12, 13, 14, 17

Hanssen v. Wingren, 121 F. 2d 1011, cert. den. 256 U. S. 694 ..... 16, 17

In re Hinckel Brewing Co., 123 F. 942 17

In re Inland Gas Corporation, 275 F. 2d 509, cert. den. sub nom. Kern v. Columbia Gas System, 363 U. S. 813 ..... 12, 13, 14, 15, 17

Knight v. Wertheim & Co., 158 F. 2d 838, cert. den. sub nom. McGuire v. Equitable Office Bldg., Corp., 331 U. S. 813 ..... 12, 13, 14, 17, 18

Larson v. First State Bank of Vienna, 21 F. 2d 936 .. 17

Nichols v. Alker, 231 F. 2d 68, cert den. 352 U. S. 829 19

Pfister v. Northern Illinois Finance Corp., 317 U. S. 144 16

In re Sobod, Inc., 25 F. Supp. 344, affd. 103 F. 2d 1019 17

Standard Steel Works v. American Pipe & Steel Corp., 111 F. 2d 1000 17

PAGE

In re Technical Marine Maintenance Co., 169 F. 2d 548 ..... 16, 17

In The Matter of TMT Trailer Ferry, Inc., 292 F. 2d 455 3

In re Trustees System Discount Co. of Chicago, 85 F. 2d 467, cert. den. sub nom. Wilson v. Metropolitan Life Ins. Co., 295 U. S. 599 ..... 16, 17, 19

In re Universal Rubber Products Co., 25 F. 2d 168, affd. 28 F. 2d 253 19

Vanston Committee v. Green, 329 U. S. 156 9

Wayne United Gas Co. v. Owens-Illinois Glass Co., 30 U.S. 131 16

Statutes:

Bankruptcy Act, Sec. 24c (11 U.S.C. § 47c) 2
27 (§ 50) 3, 10
77B (§ 207) 14
102 (§ 502) 10
222 (§ 622) ...2, 3, 13, 15
224 (§ 624) 2, 3, 12
228 (§ 628) 2, 3, 12
229 (§ 629) 2, 3, 5, 9, 11, 12, 13, 15, 18

Chapter X (11 U.S.C. §§ 501 et seq.) 2, 3, 8, 13, 14, 15, 16

28 U.S.C. § 1254(i) 2

Miscellaneous:

Rules of Civil Procedure, Rule 52(a) 7

Senate Judiciary Committee Report 1395, 82 Cong., 2nd Sess., p. 8 13

APPENDIX

PAGE

Opinion of the United States Court of Appeals for the Fifth District 1a

Judgment 12a

Order Denying Rehearing 13a

Text of Statutes Involved 14a

Order Appointing Special Master 18a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees,
Petitioners,

v.

C. GORDON ANDERSON, as Trustee in Reorganization,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion below is reported at 292 F. 2d 455 (App. 1a-11a).[1] No opinion was delivered in the District Court: the pertinent orders appealed from appear at R. 307-308, 324-326 and App. 13a, 18a.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered July 7, 1961 (Tr. 544-556). By order dated August 18, 1961 the Court denied petitioners' timely petition for

[1] Source references herein are indicated by the following abbreviations:

Appendix to this petition—"App."
Certified Transcript —"Tr."
Record below —"R."

rehearing (Tr. 563). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 11 U.S.C. § 47c (Bankruptcy Act, § 24c).

Questions Presented for Review

1. Do §§ 222, 224, 228, and 229 of the Bankruptcy Act authorize, not the congruent alteration or modification of a confirmed plan of reorganization in a Chapter X proceeding, but its complete revocation after more than a year, so as to substitute a new plan that would destroy or adversely affect rights previously recognized in the confirmed plan.

2. Does § 229 authorize invalidation of a compromise settlement induced by a reorganization trustee and approved by a District Court and all creditors to avoid a mortgage foreclosure, on the faith of which the mortgage creditor fully performed to his irretrievable detriment, the benefits of which redounded to the debtor estate, on the theory that until a plan of reorganization is consummated no settlement is definitive and the misled mortgage creditor has no redress.

3. Where a plan of reorganization has been accepted or acquiesced in by all creditors (including the United States Government as a creditor) and confirmed, does § 229 authorize revocation of such confirmation so as to substitute a new plan, on the premise that no rights can vest before substantial consummation and the power of the Court to revoke decrees is unlimited.

4. Because Chapter X is involved, may a District Court summarily abrogate such settlement and revoke confirmation of the plan in drum head style, with no trial, merely on the petition of the trustee and in disregard of issues raised by the mortgage creditor.

5. Does a trustee, because he is a court officer, enjoy immunity from laches and estoppel, and is the debtor absolved from the consequences of his repudiation of commitments and lack of diligence.

Statutes Involved

The pertinent provisions of the Bankruptcy Act are §§ 27, 222, 224, 228, and 229 (52 Stat. 883, 11 U.S.C. §§ 50, 622, 624, 628, and 629) which are set forth at App. 14a-17a).

Statement of the Case

The Facts

This is an involuntary reorganization proceeding under Chapter X of the Bankruptcy Act, pending since June 27, 1957 in the United States District Court for the Southern District of Florida, Miami Division, of TMT Trailer Ferry, Inc., a maritime freight carrier (*Caplan* v. *Anderson*, 256 F. 2d 416, 417; *In The Matter of TMT Trailer Ferry, Inc.*, 292 F. 2d 455; App. 1a-11a). Petitioners (successors to Alex Caplan, trustee) are first preferred ship mortgagees in the principal sum of $330,000, of four vessels that were described by respondent below as "the backbone of the business" (R. 97, 98, 31, 33).

Early in the proceeding Caplan unsuccessfully sought leave in the District Court to foreclose; the Court of Appeals reversed, holding that "unless immediate and satisfactory provision is made for the protection and satisfaction of his debt, or a clear showing is made that his rights will not be affected by further delay", foreclosure must be permitted (*Caplan* v. *Anderson*, *supra*, 419; *TMT*, *supra*, 456).[2]

[2] On that appeal respondent represented that "there has been progress made toward the liquidation of a substantial portion of the balance of the obligations to" Caplan (*Caplan* v. *Anderson*, p. 419). The fact is that neither then nor to the present has anything been paid by way of interest or principal on petitioners' claim (R. 301).

Instead of granting that relief, the District Court ordered objections to be filed to the claim of petitioners and appointed a special master to hear and report on the validity, amount, and priority of lien claims. From that order, Caplan took a second appeal (*Caplan* v. *Anderson*, 259 F. 2d 283).

Respondent, the reorganization trustee, thereupon in October 1958 proposed to and urged petitioners to accept a compromise settlement consisting, on the one hand, of petitioners (1) withdrawing their then pending appeal, (2) forbearing from foreclosure, (3) permitting respondent to continue uninterrupted use of the encumbered vessels, and (4) approving provision in a plan of reorganization for payment of their claim partly in cash and partly in stock and another medium, and, on the other hand, (a) recognition of the validity and first priority of petitioners' mortgages and dismissal of the order from which the second appeal was then pending, and (b) modification of a plan of reorganization previously promulgated by respondent so as to include the agreed upon provision for petitioners (R. 28-31, 34-38, 40, 58-62, 75-77, 80, 84-87, 111, 114-117, 120, 193, 135-137, 181-185, 443-444, 446, 450, 452, 453-456, 458-460).

Respondent reported to the District Court that the settlement would eliminate protracted litigation, which, if petitioners prevailed, would render reorganization impossible, and also effect a prompt and successful reorganization through the extinguishment of the secured indebtedness of petitioners (R. 40, 111, 114-117, 453-454, 458-460). The Court concurred in the settlement as a fair solution, observing that there was no question but that petitioners had mortgages on the vessels (R. 446, 450, 454-455).

Respondent accordingly amended his plan of reorganization; the Court approved; all creditors accepted or acquiesced; and it was confirmed on March 9, 1959 (R. 35-36, 42-43, 88-119, 135-137, 181-185). Petitioners fulfilled all ob-

ligations on their part to be performed, including withdrawal of the then pending appeal (R. 35-36, 38, 301, 498). The order from which that appeal was taken, was vacated, the District Court finding that "the matters which were to be resolved by the Special Master were amicably resolved" (R. 191-193).

No appeals were taken from the order of confirmation except by a stockholders' protective committee and by the United States; the latter subsequently withdrew its appeal and accepted the plan (R. 38-43).[3] Between March 1959, when the plan was confirmed, and January 1960 the steps outlined in § 229 of the Bankruptcy Act constituting substantial consummation could not be undertaken because of those pending appeals (R. 208-211, 213-215). However, everything short thereof was completed, and on January 8, 1960 respondent moved to vest title in the reorganized corporation (R. 37-38, 41, 204-206, 213-215, 235, 244, 247, 249-251, 302).

On that date the United States Securities & Exchange Commission urged an investigation on the ground that certain beneficiaries of petitioners' trust allegedly had prereorganization dealings with the debtor or were influenced by persons who had such dealings, which might affect the validity of the mortgages (R. 216-232). Such investigation was ordered (R. 245-246).

Respondent took numerous unsupervised depositions, none before a court, referee, or special master, and that of the principal target was conducted *ex parte*, without notice to and in the absence of petitioners (R. 258-259).

On July 1, 1960 respondent filed a report of his investigation, recommending *inter alia* that confirmation of the plan of reorganization be vacated, a new plan be promulgated,

---

[3] The stockholder appeal was never prosecuted but was consolidated almost two years later with petitioners' appeal and decided simultaneously with it (App. 6a).

and that objections be filed to petitioners' claim (R. 255-295).

It is undisputed and indisputable that neither then nor subsequently when the orders were made revoking confirmation of the plan did the Court even see the depositions or any of the exhibits on which respondent's investigation report is predicated. The proof thereof is that long after the orders had been made the District Court Clerk certified that of the 33 depositions taken by respondent, only 7 had even then been filed in whole or in part, 26 depositions and all exhibits being still unfiled; of the other 7 depositions, 4 in their entirety and part of one more were still in the sealed envelopes in which transmitted by the stenographer to the Court Clerk (R. 349-350).

On the return of the notice, petitioners filed a detailed answer controverting respondent's report in its entirety, and raising as issues the compromise settlement, vested rights, laches, estoppel, lack of jurisdiction of the Court to vacate the confirmation order, etc. (R. 298-304). No trial was held and no opportunity afforded to present evidence (R. 307). Five days later a preliminary order was entered that, upon remand of the stockholder appeal, a further order would be entered vacating confirmation of the plan of reorganization and directing respondent to prepare a new plan (R. 307-308, 181-185). No cognizance was taken of petitioners' answer or any issue therein raised (R. 298-304).

When, on respondent's application, the stockholder appeal was remanded, respondent moved on two days' notice for a final order of revocation (R. 314-316). On the return day no evidence was taken and no trial was conducted despite the interposition of a further answer by petitioners, and the order was signed forthwith that same day (R. 316-322, 324-326). It vacates confirmation of the plan and directs respondent to file a new one and take such action as

he deems appropriate in respect of petitioners' claim (R. 324-326). Among other distinctive features of the order are: (1) in their answer petitioners urged that their rights had become vested in that in reliance upon the occurrences recited above they had been induced to lose a strategic position, had sustained irreparable prejudice, and could not be restored to their prior status; with not even superficial observance of the requirements of a trial, the Court held the reverse (R. 298-304, 317-318, 325); (2) there was no finding that the plan was unfair or inequitable, only a recital that such was "the opinion of the trustee" (R. 325), which was equated with the function of the Court; there was complete abdication of jurisdiction to respondent, whose "opinion" was accepted as decisive, without opportunity for refutation; (3) no finding was made adverse to the validity of petitioners' secured debt; it sufficed—the order so reciting—that "It appears from the Trustee's report that there are substantial questions • • •" (R. 325); respondent having determined that there were "questions", the matter was thereby concluded; (4) the order of confirmation entered March 9, 1959 contains "Findings of Fact" that the plan of reorganization is fair, equitable, and feasible, was accepted in good faith, and that all other statutory requirements were observed (R. 181-185); Rule 52(a) of the Rules of Civil Procedure provides that such findings "shall not be set aside unless clearly erroneous"; no contrary findings were subsequently made by the District Court, and the record is devoid of admissible competent evidence establishing such findings to be erroneous.

The order further recites that it "appears that the Trustee's investigation disclosed facts not known to the Trustee or to the Court at the time the plan was confirmed" (R. 325). The reason for such recital was that petitioners' answer alleged that whatever was contained in respondent's investigation report "was either in (his) possession • • • or with the exercise of reasonable diligence • • • could have (been) obtained at any time prior to the compromise

settlement" (R. 302). The record establishes beyond cavil that 14 months elapsed between respondent's appointment and approval of the plan; confirmation did not occur until 3 months later; all the alleged events purportedly adverted to in the investigation report occurred prior to reorganization; information concerning them was at all times ascertainable from records in respondent's possession and persons available for examination; petitioners' predecessor volunteered on more than one occasion to produce whatever information and documentation were desired; and the matters, or most of them, on which the investigation report relies, were specifically brought to respondent's and the Court's attention prior to confirmation (R. 24-26, 31-32 35, 128, 131-132, 179-187, 226-229, 263 *et seq.*, 462-464).

On February 6, 1961 an order was entered essentially identical with the order from which respondent induced petitioners to withdraw their second appeal, appointing a special master to hear and consider objections to petitioners' claim, determine the amounts and priorities of liens against the encumbered vessels, etc. (App. 18a-19a).[4]

The Opinions Below

The District Court

No written opinions were rendered. The Court's rationale was that in a Chapter X proceeding, irrespective of settlements, confirmation, laches, vested rights, lack of diligence, and absence of jurisdiction;

> "you can open it up ten years later if you want to."[5]

The Court disavowed that its action implied that the settlement was invalid, that there had been any wrong-

---

[4] By order of Court of Appeals made 2/21/61, the order above referred to and related papers were printed as an appendix.

[5] Minutes of District Court Hearing 1/27/61, printed as appendix below.

doing, or that petitioners' claim is deficient in any respect; on the contrary, the Court held:

> "Now, I don't say that there is anything I don't know, but I think that for the benefit of everybody concerned we ought to find out."[6]

The Court of Appeals

1. § 229, so far as material herein, defines when a plan of reorganization has been substantially consummated, and provides that it "may not thereafter be altered or modified" if it "materially and adversely affects the participation provided for any class of creditors or stockholders by the plan". That provision was misconstrued by the Court below as a grant of power to "set aside" completely a confirmed, unconsummated plan so as to substitute a new and different plan, fallaciously postulating it with a congruent alteration or modification of a subsisting plan (App. 8a-9a). The substantive difference between the two and the permissible scope of post-confirmation alterations have been clearly enunciated in other circuits (pp. 12-15, *infra*), and thus the opinion below creates an irreconcilable conflict in a most important area of corporate reorganizations.

2. Mr. Justice Frankfurter once wrote, "Putting the wrong questions is not likely to beget the right answers even in law" (*Vanston Committee* v. *Green*, 329 U. S. 156, 170). That quotation is apt here because the opinion below erroneously poses as the sole query to be answered: "When is a plan of reorganization so far 'consummated' as to deprive a trial court of its power to modify it or set it aside" (App. 2a). It ignores that, separable from the plan of reorganization and the treatment therein accorded petitioners, the settlement comprehended recognition of the validity and first priority of petitioners' mortgages on the encumbered property. Moreover, that

---

[6] *Ibid.*

settlement and indeed every settlement in a Chapter X proceeding is declared to be tentative and ineffectual by the holding below that "there could be no 'settlement' until the reorganization had become consummated", that is to say, until "the actions described in Section 629 had been done" (App. 7a, 10a). This means that every lease, tax, lien, and other compromise settlement—without which few reorganization plans could be formulated—are unenforceable until after a plan has been not only promulgated, approved, and confirmed, but fully consummated, notwithstanding that the compromise was approved by the Court, and the trustee induced the other party fully to perform his part.

That is at variance with the statutory authority granted trustees with the approval of the Court to effect compromises of controversies at any time and any stage of the proceeding (§§ 27, 102).

That error is compounded by the holding below that petitioners have not been prejudiced by respondent's repudiation because the "second appeal (was) from an order of the trial court refusing them the right to an immediate foreclosure. But the order they are now appealing from is in no way related to such a right" (App. 10a). To the contrary, the second appeal (which was withdrawn in reliance upon the compromise) was from an order providing for the filing of objections to petitioners' claim and appointing a special master to hear and report thereon (*Caplan* v. *Anderson*, 259 F. 2d 283). When the settlement was concluded and the appeal withdrawn, that order was vacated by the District Court, which held that "the matters which were to be resolved by the Special Master were amicably resolved" (R. 191-193).[7]

[7] By order entered February 4, 1958 proofs of claim were to be filed within a prescribed time and deemed allowed unless objection was filed prior to confirmation; the time to file objections to petitioners' claim expired long prior to August 15, 1960, when the Court for the second time authorized respondent to attack it (R. 36, 46-49).

The final order revoking confirmation authorized respondent to contest the claim of petitioners (R. 324-326). It was implemented by an order of reference, which is a counterpart of the order from which the second appeal was taken (App. 18a-19a).

Furthermore, when petitioners discontinued their appeal and refrained from enforcing their mortgage rights, they lost their "strategic position" (to borrow the SEC's language in its brief below) and cannot be restored to their pre-settlement status. In this petition, however, it would be irrelevant to relate the destruction of some and the extent of the depreciation of others of the mortgaged vessels. Whether in the interim the fortunes of the debtor have fared, as respondent urged below, or they deteriorated, as petitioners urged, is also presently of no moment as the avowed purpose of the revocation of the confirmed plan is to harm the position of petitioners by no longer recognizing the validity and priority of their claim and by substituting a new plan less favorable to them.

3. The opinion below, as already shown, interprets § 229 as granting power to set aside confirmed plans of reorganization and as nullifying settlements made by a trustee. It elasticizes the section further to postpone the vesting of rights until after substantial consummation so as to neutralize the long standing rule that the power of courts of bankruptcy, being courts of equity, to vacate decrees is subject to intervening rights (pp. 16-18, *infra*).

Notwithstanding that respondent conceded below that petitioners had taken numerous steps "in reliance on compromise", including the dismissal of an appeal, forbearance from enforcing mortgages, etc., the Court of Appeals held that "no intervening rights had accrued. None of the actions described in Section 629 had been done" (App. 10a). In short, the vesting of intervening rights was held to be precluded until after substantial consummation had occurred.

4. Such basic equitable factors as laches, estoppel, and lack of diligence were held unavailable on the ground that "The trustee was a court officer. His duties are a part of judicial administration" (App. 10a). This is tantamount to a declaration that reorganization proceedings may be conducted by trustees in federal courts with no moral imperative.

Reasons for Allowance of Writ

1. The decision below that § 229 of the Bankruptcy Act grants the power to set aside a confirmed but unconsummated plan of reorganization is in conflict with decisions of the Second, Sixth, and Seventh Circuits.

In re Inland Gas Corporation, 275 F. 2d 509 (Sixth Circuit, 1960), cert. den. *sub. nom. Kern* v. *Columbia Gas System*, 363 U. S. 813 (June 1960);

Knight v. *Wertheim & Co.*, 158 F. 2d 838 (Second Circuit, 1946), cert. den. *sub. nom. McGuire* v. *Equitable Office Bldg., Corp.*, 331 U. S. 813;

Country Life Apartments v. *Buckley*, 145 F. 2d 935 (Second Circuit, 1944);

In re Diversey Building Corporation, 141 F. 2d 65 (Seventh Circuit, 1944).

§ 224 provides that "Upon confirmation of a plan • • • its provisions shall be binding upon the debtor • • • and upon all creditors and stockholders." That a final decree is to be entered when all steps completing consummation have been taken (§ 228) in no way alters the "binding" effect given the plan upon confirmation. That final decree is the terminal point in the reorganization, discharging the debtor and ending all rights of stockholders except as provided in the plan or order of confirmation, and discharging the trustee and closing the estate.

§ 222 provides that a plan "may be altered or modified before or after its confirmation". As applied to plans of reorganization subsequent to confirmation and prior to consummation, the first three cited cases hold that alterations and modifications may be made only if they are "congruent" with the plan, and that, under the guise of altering or modifying, a new plan may not be substituted.

Knight, Country Life, and *Diversey* were all decided before 1952 when § 229 was added. If the construction reached in those cases did not comport with the intent of the Congress, it could then have made its will plain. Instead, the legislative history of § 229 makes plain that its purpose was not to grant new power to alter or modify plans at variance with the holdings of the cited cases, but, following the *Knight* case, to impose "an absolute bar time" (Sen. Jud. Com. Rep. 1395, 82 Cong., 2nd Sess., p. 8).

Inland, decided some 8 years thereafter, cites those three cases with approval, reaffirms the principle enunciated by them, and obviously and correctly found nothing in § 229 inimical thereto.

In *Inland,* a Chapter X reorganization, promptly after confirmation and while the plan was wholly unconsummated, alterations and modifications were proposed, which the District Court declined to consider. The Court of Appeals affirmed on the ground that the proposed alterations and modifications

> "are not merely such, but in totality constitute an altogether new and different proposed plan of reorganization." (p. 511)

and that

> "District Judge Ford aptly stated that section 222 authorizes modification, but does not authorize 'stopping in the middle of a stream and starting a new plan with all of its problems afresh.' " (p. 514)

The opinion refers to *Diversey*, wherein the subsection of § 77B (the predecessor of Chapter X) that provided that changes and modifications might be proposed before or after confirmation, was held to mean

> "that changes and modifications *after the plan is confirmed* refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and does not mean such changes or modifications as will materially alter the property rights established by the decree of confirmation." (p. 513; italics in original text)

Inland also refers to *Country Life*, a Chapter X proceeding in which amendments to the plan were offered at the time of confirmation; in affirming their rejection, the Court of Appeals held:

> "Appellants' proposals filed by way of objections, however, differed so greatly from the trustee's plan that they could not possibly be treated as a mere modification • • • (and) clearly constituted a newly proposed plan which could not be offered at this late stage of the proceedings." (p. 937)

Inland discusses *Knight* as follows:

> "Knight v. Wertheim, 2 Cir., 158 F. 2d 838, is regarded by appellants as strong authority in their behalf. We do not agree with their argument for, in that case, Judge Learned Hand said that the proposed changes were not so radical as to fall within the ambit of the court's previous decision in the Country Life Apartments v. Buckley case. • • •
>
> "Moreover, in Prudence Bonds Corporation v. City Bank Farmers Trust Co., 2 Cir., 186 F. 2d 525, 528, Judge Hand impressively said: '• • • the court may never under the guise of "alteration" or "modification" substitute an entirely new "plan" in place of the original;' " (p. 513)

Knight was a Chapter X proceeding in which after confirmation and before consummation stockholders proposed alterations and modifications that affected the plan in but one respect: instead of debenture holders being paid in new convertible bonds and stock, the stock would be sold and from the proceeds the debenture holders would be paid in cash in full with interest. Judge Learned Hand, writing for the Court, held

> "We said in our opinion (*Country Life Apartments* v. *Buckley*) that there was a limit to what might be considered an 'alteration' or a 'modification' and that the proposal had exceeded it; and the Seventh Circuit spoke (in Diversey) of the court's not having 'jurisdiction' to act upon the proposal; we agree that, although there appear to be no limits to the changes which may be made in a plan before 'approval', and indeed thereafter, until 'its submission for acceptance' under Section 179, 11 U.S.C.A. § 579, nevertheless any changes after submission must be to some extent congruent with the plan." (p. 842)

The modification proposed there was held to be in that category inasmuch as the debenture holders would receive full payment and thus not be adversely affected.

In direct conflict with those decisions, the Court below herein endows §§ 222 and 229 with a meaning that no fair reading of the statutory language yields. Whereas the sections refer to "alteration or modification" of a plan, and the cited decisions require that any post-confirmation changes be consistent with the plan, the opinion below rewrites the sections to authorize revocation of confirmation to pave the way for "a new plan of reorganization" (R. 325).

Unless reversed, it will make precarious all interests in reorganization proceedings right up until the estate is closed.

2. The holding below that there can be no compromise settlement of a claim in a reorganization proceeding until after substantial consummation of a plan conflicts with decisions in the Third, Seventh, and Tenth Circuits.

Hanssen v. *Wingren*, 121 F. 2d 1011 (Tenth Circuit, 1941), cert. den. 256 U. S. 694;
In re Trustees System Discount Co. of Chicago, 85 F. 2d 467 (Seventh Circuit, 1936), cert. den. *sub nom. Wilson* v. *Metropolitan Life Ins. Co.*, 295 U. S. 599;
In re Technical Marine Maintenance Co., 169 F. 2d 548 (Third Circuit, 1948).

The cited cases hold that there may be a settlement apart from a plan of reorganization and that a trustee is bound to perform his commitments irrespective of whether or not consummation has occurred.

3. In conflict with the decisions of this Court, the opinion below permits revocation of decrees on which litigants have acted to their irretrievable detriment, on the premise that no intervening rights can vest before substantial consummation.

This Court has held that judicial power to revise judgments must be exercised before intervening rights have vested on the faith of its action (*Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 136-137; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152; see also *Curtis* v. *O'Leary*, 131 F. 2d 240, 245).

The Court below, while purporting to recognize that principle, sterilizes its efficacy by holding that in a Chapter X proceeding there can be no definitive adjudication under which rights vest until after substantial consummation of a plan of reorganization has occurred (App. 7a-10a). As so interpreted, no creditor is afforded any protection by

any order of a Court until the estate is closed. At any time prior thereto, he is exposed to the danger of repudiation, notwithstanding that he has fully performed all obligations undertaken by him and cannot be made whole.

It has been shown hereinabove that petitioners were induced to dismiss an appeal, withhold enforcement of their mortgage rights, etc., in reliance upon an order of the District Court vacating a previous order directed at the validity, amount, and priority of their claim, and upon an order confirming a plan of reorganization that contained agreed upon treatment of their claim. Petitioners cannot now be restored to their pre-settlement status, and their rights have intervened and vested, regardless of whether or not substantial consummation has occurred (*Haussen* v. *Wingren, supra; In re Trustees System Discount Co. of Chicago, supra; In re Technical Marine Maintenance Co., supra; Petition of Baxter* (*In re Orinoco Corp.*) 269 F. 344, Sixth Circuit, cert. den. 256 U. S. 694; *In re Hinckel Brewing Co.*, 123 F. 942; *Larson* v. *First State Bank of Vienna*, 21 F. 2d 936; *Standard Steel Works* v. *American Pipe & Steel Corp.*, 111 F. 2d 1000; *In re Sobod, Inc.*, 25 F. Supp. 344, affd. 103 F. 2d 1019).

The opinion below fails to recognize that there can be—as there was in this case—a settlement of a claim that is separable from the treatment to be accorded it under a plan of reorganization. The issue of amount, validity, and priority of the claim of petitioners was, as the District Court ordered, "amicably resolved" (R. 191-193).

As to the treatment to be accorded petitioners in the plan, *Inland* and *Diversey* disagree with the Court below herein and prohibit not merely post-confirmation substitution of a new plan, but also alterations that "will materially alter the property rights established by the decree of confirmation" (p. 513). *Knight*, consistent therewith, although permitting a post-confirmation modification, held the power of modification to be subject to the stricture that the alteration must be "congruent" with the plan.

Payment in full in cash with interest, in lieu of payment partly in cash and partly in other media, might be such an alteration as would not adversely affect petitioners and be permissible within the *Knight* holding. But complete rejection of the plan in order to enable respondent to take such action as he deems appropriate in respect of the claim of petitioners and to submit a new plan clearly violates their vested rights (R. 324-326).

To achieve that result the District Court relied upon some undefined and unstated power in any event to "open it up 10 years later". The Court of Appeals did not go that far, but in effect remolded the bar provision of § 229 against alteration and modification after substantial consummation into a divestiture of rights previously established. For that, there is no precedent, and unless reorganization proceedings are to be rendered chaotic, reversal by this Court is required.

4. The order revoking confirmation of the plan of reorganization was made without affording petitioners even a semblance of a judicial hearing.

The Court of Appeals held that "for good cause shown" the District Court could "withdraw its prior approval" and that a "sufficient showing" had been made herein by respondent's investigation, which "disclosed" certain matters (App. 5a, 9a).

That conflicts with the District Court's disavowal that it had found adversely to the propriety of the settlement or the validity of petitioners' claim (pp. 8-9, *supra*). Moreover, in revoking the settlement and confirmation the District Court disregarded even the rudimentary requirements of a judicial hearing: it acted summarily, without a trial, with no evidence before it, without even seeing the challenged and inadmissible documentation on which respondent's report was based, with no consideration of the issues raised by petitioners, and without making any findings (pp. 5-8, *supra*).

The orders in question were only nominally those of the District Court, which completely abdicated the judicial function to respondent, who was granted *carte blanche* to determine this most vital aspect of the reorganization.

Such practice is a perilous precedent for the conduct of reorganization proceedings.

5. The decision below exempting respondent from laches, estoppel, and lack of diligence because he is a court officer, is in conflict with holdings of the Second, Third, Sixth, and Seventh Circuits.

Petition of Baxter (In re Orinoco Corp.) supra (Sixth Circuit);
In re Trustees System Discount Co. of Chicago, supra (Seventh Circuit);
In re Universal Rubber Products Co., 25 F. 2d 168, affd. 28 F. 2d 253 (Third Circuit);
Nichols v. *Alker*, 231 F. 2d 68 (Second Circuit), cert. den. 352 U. S. 829.

CONCLUSION

For the foregoing reasons a writ of certiorari should be allowed.

Dated: November 10, 1961.

Respectfully submitted,

M. JAMES SPITZER,
Attorney for Petitioners.

REICH, SPITZER & FELDMAN,
KNIGHT, SMITH, UNDERWOOD & PETERS,
of Counsel.